IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6041

DAVE PERNELL, *Petitioner,*

v.

SOUTHALL REALTY, *Respondent.*

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR AMICUS CURIAE APARTMENT HOUSE COUNCIL OF METROPOLITAN WASHINGTON, INC.

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INTRODUCTION

In the instant case, this Court is called upon to resolve a significant question in the procedures under the District of Columbia's landlord-tenant law, in particular, whether a trial by jury is constitutionally required for a summary possessory action of the kind recently before the Court in *Lindsey* v. *Normet,* 405

U.S. 56 (1972). This brief is filed by the Apartment House Council of Metropolitan Washington, Inc. (hereinafter the "Council") as *amicus curiae*. The Council is a non-profit corporation organized under the laws of the District of Columbia. Its 125 regular members own or manage some 200,000 apartment units in the District of Columbia and surrounding suburban areas of Northern Virginia and Maryland. The Council is concerned that procedural complications in the summary proceeding may tend to delay the speedy adjudication designed to prevent both undeserved economic loss to landlords and unmerited harassment and dispossession of tenants. Both parties have consented to the filing of this brief and the consents were filed with the Court on or about June 6, 1973.

STATEMENT OF QUESTION PRESENTED

Whether, in a statutory summary eviction proceeding in the District of Columbia,[1] the seventh amendment guarantees a trial by jury on either the landlord's claim or on the tenant's affirmative defenses and counterclaims.

STATEMENT OF THE CASE

On July 20, 1971, respondent Southall Realty commenced an action in the Landlord & Tenant Branch of the Superior Court of the District of Columbia pursuant to D.C. Code § 16-1501 (Supp. V 1972) to regain possession of premises leased to petitioner, Dave Pernell, under a written lease agreement dated

[1] The resolution of the issues presented concerns solely the procedure in the Superior Court of the District of Columbia since this Court has long recognized that the seventh amendment is inapplicable to proceedings in state courts. *See, e.g., Walker* v. *Sauvinet*, 92 U.S. 90, 92-93 (1876).

May 10, 1971 (A.6).[2] Although the complaint alleged as grounds for the action Pernell's default of $375.00 in three months' rent, the complaint made no demand for rent in arrears or distress on personalty (A.7). On the return day, August 9, 1971, Pernell filed a verified answer denying that any rent was owed or that a notice to quit had been served or validly waived (A. 11). Moreover, Pernell contended that the premises had been maintained in an uninhabitable condition and in violation of the District of Columbia Housing Regulations, and that Southall had breached its agreement to credit repairs made by Pernell against his rent (A.11). Pernell further asserted a set-off in the amount of $389.60 for repairs made to bring the premises into partial compliance with the housing code and a counterclaim in the amount of $75.00 for rent already paid while the premises were maintained in violation of the housing regulations (A.13). A jury trial was demanded in the answer (A.12), and the necessary fees were paid (R. 172).[3]

On the day Pernell filed his answer and appeared with counsel, Judge Joseph M. F. Ryan, Jr., *sua sponte* struck the jury demand and continued the case one week, to August 16, 1971, for trial (A.1). Pernell's counsel appeared on the continued date without his client and the case was called for trial (R.61). Counsel stated that he had expected to argue the propriety of the court's striking of the jury demand and requested a further continuance to secure

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[2] Citations to "A —" are to the printed appendix filed in this Court by petitioner on August 6, 1973.

[3] Citations to "R —" are to the record transmitted to this Court by the court below.

Pernell's presence (R. 61). The request was denied (R.61).

The sole witness at the ensuing trial was Southall's agent, who authenticated the lease agreement and testified that no rent had been paid and that Pernell had not completed the agreed repairs. At the conclusion of the direct and cross-examination of the witness, Judge Ryan found for Southall and, on August 20, 1971, entered judgment, for Southall for possession and costs, issuing a writ of restitution (A.1).

Pernell filed a notice of appeal on August 25, 1971 (A.1). The case was argued before the District of Columbia Court of Appeals on May 10, 1972 (A.5). That court on May 10, 1972 remanded the record to the trial court for supplementation on the issue of whether the jury fee had been paid (R. 162). Following a hearing on May 16, 1972, the record was supplemented to reflect the trial court's finding that the fee had been paid and the supplemental record ordered transmitted to the Court of Appeals (A.3). In an opinion reported at 294 A.2d 490, the Court of Appeals on August 31, 1972, rejecting Pernell's contention that he was unconstitutionally deprived of his right to a jury trial, affirmed the decision of the trial court (A.14). Pernell filed a petition for a writ of certiorari on January 13, 1973 which was granted by this Court on April 2, 1973 (A.32).

SUMMARY OF ARGUMENT

The seventh amendment creates no new rights to a trial by jury; it merely preserves those rights, in suits at common law, as they existed at the time the amendment was adopted. The landlord's claim asserted

in the District of Columbia's statutory summary eviction proceedings was not one which would have been tried to a jury under the English common-law prevailing when the seventh amendment was adopted. The claim's closest historical counterpart was not triable to a jury. The statutory summary eviction proceeding derives from actions historically tried before special commissioners or referees presided over by one or more justices of the peace, and did not proceed according to the course of the common law. The tenant's affirmative defenses and claims asserted in the proceeding are wholly equitable in nature; legal claims can be asserted only in a separate action initiated by the tenant.

ARGUMENT

The statute under which Southall proceeded, D. C. Code § 16-1501 (Supp. V 1972), provides:

> "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given for the restitution of possession."

No mode of trial for such actions is prescribed and the issues presented in the instant case result from the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 90-358, 84 Stat. 473 (hereinafter referred to as "Court Reform Act"), which became effective February 1, 1971.

Prior to the effective date of the Court Reform Act, the United States District Court for the District of Columbia was the trial court of general jurisdiction in the District. *See* D.C. Code §§11-521, et seq. (1967). The District of Columbia Court of General Sessions exercised concurrent civil jurisdiction where the amount in controversy did not exceed $10,000, *see* D. C. Code §11-961 (1967), was specifically empowered to try proceedings under D. C. Code §16-1501, and had no jurisdiction over cases involving title to real property except as part of a divorce action, *see* D. C. Code § 11-1141 (1967). The Court Reform Act substantially reorganized the court system within the District of Columbia. After a thirty-month transition period, the United States District Court for the District of Columbia had civil jurisdiction essentially identical to that of any United States District Court, *see* D. C. Code §11-501 (Supp. V 1972), and the newly created successor court to the Court of General Sessions, the Superior Court of the District of Columbia, became the court of general original jurisdiction, *see* D. C. Code §11-921 (Supp, V 1972). The Court Reform Act, §142(5)(A), 84 Stat. 552 also repealed, for reasons which are disputed,[4] D. C. Code §13-702 (1967),

[4] The committee report on the House version stated that the D. C. Code chapter containing § 13-702 (1967) was "superfluous in light of constitutional jury trial requirements . . . ." *See* H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970). On the other hand, the Senate version retained the provisions of § 13-702 "so as to assure the constitutionality of the provisions regarding *small claims.*" *See* S. Rep. No. 91-405, 91st Cong., 1st Sess. 35 (1969) (emphasis supplied). However, although the legislative history of the Court Reform Act would be relevant to the statutory construction of the Act, it is of little moment in the instant case since Congress unquestionably repealed the statutory jury trial right. If Congress determines that the repeal was unintentional or unwise, Congress can easily restore the statutory right.

which had provided that "[w]hen the amount in controversy in a civil action pending in the District of Columbia Court of General Sessions exceeds $20, and in all actions for the recovery of possession of real property either party shall be entitled to a trial by jury. . . ."[5]

In *Capitol Traction Co.* v. *Hof,* 174 U.S. 1, 5 (1899), this Court squarely held that the seventh amendment applies to civil actions in the District of Columbia. That amendment provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII.

It is well settled that the seventh amendment creates no new rights to trial by jury, it merely preserves those rights as existed at the time the Constitution was adopted, "[i]n suits at common law." *See Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446-47 (1830).

There are several well established principles governing resolution of civil jury trial questions. Pernell's fundamental disagreement with the Court of Appeals decision is not with the formulation of these principles, but with their application. As framed by the court below the inquiry was "whether this action or its equivalent existed at common law in England in 1791." *See* 294 A.2d at 492. As summarized in pages

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[5] The constitutional question presented herein was left undecided in light of the statutory right to a trial by jury given in the predecessor to § 13-702. *See Kass* v. *Baskin,* 82 U.S. App. D.C. 385, 386 n. 4, 164 F.2d 513, 514 n. 4 (1967).

13 and 14 of his printed Brief, the tenant argues that the inquiry is whether the claim asserted by the landlord is one "that would be tried to a jury under the English common law prevailing when the Seventh Amendment was adopted" and whether the claim "finds its closest historical counterpart in claims triable to a jury at common law or falls under a different head of jurisdiction — such as equity — where a jury trial was not available." The historical basis of D. C. Code §16-1501 (Supp. V 1972) is thus the starting point of discussion.

In the Organic Act of 1801, ch. 15, §1, 2 Stat. 104, Congress adopted for the newly created District of Columbia the laws then in force and effect in Maryland. Among these was the predecessor of the summary eviction statute, "An Act to provide a summary mode of recovering the possession of lands and tenaments holden by tenants for years, or at will, after the expiration of their terms." Act of 1793, ch. XLIII, II W. Kilty, Laws of Maryland (1800). This statute, reprinted in full at page 1b of petitioner's printed Brief, provided a summary proceeding where a tenancy for years or at will had been terminated and the tenant had refused to comply with the landlord's written notice to quit. *See id.* Upon complaint and proof to two justices of the peace of the county, the justices were "required forthwith to issue their warrant . . . commanding [the sherrif] to summon twelve good and lawful men of his said county, to be and appear on the premises before the said justices [within four days] . . . and their summons to the tenant [to] appear and . . . show cause . . . why restitution of the possession of said lands . . . should not be forthwith made to such lessor. . . ." If, after proof,

the "jury"[6] found that the landlord was entitled to possession by reason of the termination of the tenancy and notice to quit, the justices were to award restitution of the possession of the lands to the lessor. *See id.* This expedited procedure was not followed, however, where the tenant disputed the lessor's title; in such cases, the tenant was, after posting a bond, to prosecute his claim under the disputed title "at the next county court." *See id.*

Proceedings under the Maryland Act continued until Congress enacted a general revision of landlord and tenant law in the Act of July 4, 1864, ch. 243, 13 Stat. 383. The Act departed from the Maryland practice by making the proceeding available, without regard to the existence of a lease, to wrongful holdings obtained by forcible entry or maintained by forcible detainer, and by giving either party the right of appeal from the justice of the peace court and trial *de novo,* with the right to a jury, before the Supreme Court of the District of Columbia. *See* 13 Stat. 383-84. The preclusion of the remedy to a landlord whose title was disputed was maintained, section 3 of the Act providing that on posting of a bond by the tenant, the case was "certified" to the Supreme Court of the District of Columbia.[7]

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[6] As demonstrated at pages 12-14, infra, the "twelve good and lawful men" called for in the statute did not constitute a "jury" as that term was contemplated in the seventh amendment.

[7] The distinct procedure to be followed where title was disputed has been carried to the present day. D. C. Code § 16-1504 (1967), *repealed,* Court Reform Act, § 145(g)(2), 84 Stat. 560, provided in such cases for the posting of a bond and certification of the case to the United States District Court for the District of Columbia. An essentially identical scheme for certification to the Superior Court's Civil Division is now provided by local rule. See Rule 5(c), Superior Court Rules—Landlord and Tenant.

Following this Court's limitation of the Act, in *Willis* v. *Eastern Trust & Banking Co.*, 169 U.S. 295 (1898), to the conventional relation of landlord and tenant unless forcible entry or detainer was involved. Congress made the procedure available to possessory disputes arising out of mortgages. *See* Act of March 3, 1901, ch. 854, 31 Stat. 1193. Simultaneously, jury trials were abolished in the justice of the peace court and were retained in *de novo* appeals to the District's Supreme Court. *See* 31 Stat. 1191, 1201. Subsequently the justice of the peace court was replaced by the Municipal Court, *See* Act of February 17, 1909, ch. 134, § 1, 35 Stat. 623, and the Municipal Court was made a court of record with the power to conduct jury trials, *see* Act of March 3, 1921, ch. 125, §§ 2, 3, 41 Stat. 1310. The *de novo* appeal procedure was simultaneously abolished. *See id.*, § 12, 41 Stat. 1312. The availability of the statutory eviction proceeding was extended to its present scope, any situation where property was detained without right or after right to possession had ceased, in 1953. *See* Act of June 18, 1953, Pub. L. No. 83-71, 67 Stat. 66.

Returning from the present to the English antecedents of the Maryland statute of 1793 from which D.C. Code §§ 16-1501, *et seq.* (Supp. V 1972) are derived, the historical materials were summarized in *Urciolo* v. *Evans*, L & T No. 60495-71, reported in part, 99 Daily Wash. L. Rep. 1729 (Super. Ct. 1971). *Urciolo* is reproduced in full in the Petition for Writ of Certiorari at 19a-44a. In summary, *Urciolo* recognized several likely historical counterparts of the statutory eviction proceeding—the action of ejectment, the writ of assize of novel disseisin, and the writ of entry. *See* Petition for Writ of Certiorari at 22a.

After a scholarly analysis of these counterparts, the court in *Urciolo* concluded that the "imprint of assize [on the Maryland statute] is extraordinary." *See id.* at 31a. It is in this historical context that we turn to consideration of the issue presented.

What then is the nature of the summary eviction statute under which the procedure before the trial court has long been recognized as "not according to the course of the common law?" *See Harris* v. *Barber,* 129 U.S. 366, 369 (1889). "Statutes relative to actions of summary process for the recovery of possession by a landlord confer new rights and prescribe a remedy by a course of proceeding unknown to the common law." 3A Thompson, Real Property, § 1370 at p. 718 (1959 Repl. Vol.). Courts act in such proceedings, not under their general common law jurisdiction, but solely pursuant to the statutory grant of authority. *See Townsend* v. *Brooks,* 5 Cal. 52, 53 (1855); *Chicago* v. *Chicago S.S. Lines, Inc.,* 328 Ill. 309, 315, 159 N.E. 301, 303 (1927). In fact such proceedings are in derogation of the common law. While "[a]t common law, one with the right to possession could bring an action for ejectment, a 'relatively slow, fairly complex, and substantially expensive procedure,'" the common law also recognized the landlord's right to self help. *See Lindsey* v. *Normet,* 405 U.S. 56, 71 (1972). Summary eviction procedures were enacted "to alter the common law and obviate resort to self-help and violence." *Id.* Petitioner, in pages 17-18 of his printed Brief, attempts to fit the proceedings below into Mr. Justice Story's classic seventh amendment mold—

> "'By common law [the framers of the Constitution] meant . . . not merely suits, which the common law recognized among its old and settled pro-

> ceedings, but suits in which legal rights were to be ascertained and determined . . . . [*Parsons* v. Bedford,] 28 U.S. (Pet.) [433,] 447 [(1830)]."

However, Mr. Justice Story noted in the same paragraph that "[p]robably there were few, if any states in the Union, in which some new legal remedies, differing from the old common law forms, were not in use, but in which, however, the trial by jury intervened, and the general regulations in other respects *were according to the course of the common law.*" *Id.* (emphasis supplied). Accordingly, it is difficult to accept petitioner's contention that actions *not* in accordance with the course of the common law were within the contemplation of the framers as common law actions to which the seventh amendment applied. *Cf.*, *Waring* v. *Clarke*, 46 U.S. (5 How.) 441, 459 (1847).

Perhaps the greatest conceptual difficulty in the consideration of the nature of the summary action which originated with the Maryland statute is that statute's appellation "jury" applied to the "twelve good and lawful men" to be summoned by the sheriff. A "jury," within the meaning of the seventh amendment, does not necessarily mean a deliberative body of twelve men, *see Colgrove* v. *Battin*, 411 U.S. — (1973); neither, it will be demonstrated, is a deliberative body of twelve necessarily a "jury," as that term was understood by the framers. The Pennsylvania counterpart to the Maryland statute was enacted in 1772 and similarly called upon the sheriff to summon twelve freeholders to determine the issues. *See Kinley* v. *McFillen*, 6 Phila. 35 (Com. Pl. 1865). In rejecting a challenge, under the state constitutional provisions corresponding to the seventh amendment, to the trial of the case without a jury, the court stated that "[i]t is

assuming too much when it is taken for granted that in all cases in which the legislature provides for the ascertainment of specific facts or issues by twelve men, that the proceedings before them constitute a *trial* by jury." *Id.* The Maryland Statute, like the Pennsylvania statute considered in Kinley, commands the summoning of exactly twelve men without provisions for selection of a smaller panel from the twelve or for challenges for cause. Compare Act of Maryland of 1793, ch. XLIII, II W. Kilty, Laws of Maryland (1800) *with Kinley, supra.* In considering a similar challenge to South Carolina's summary eviction procedures, the Supreme Court of that state recognized that the proceedings before twelve freeholders in the presence of magistrates was one before a "special tribunal for exceptional cases" rather than a trial by jury which the state constitution preserved inviolate. *See Frazee* v. *Beattie,* 26 S.C. 348, 352, 2 S.E. 125 (1886). The members of panel under the similar Delaware statutory scheme are referred to as "referees." *See Crow* v. *Cann,* 43 Atl. 839, 840 (Del. Super, 1899). Summary eviction statutes not providing for trial by jury have withstood attack under state constitutional provisions. *See Peasant* v. *Heartt,* 22 La. Ann. 292 (1870); *Missouri ex rel. Kansas City Auditorium Co.* v. *Allen,* 45 Mo. App. 551 (1891); *Reece* v. *Montano,* 48 N.M. 1, 144 P. 2d 461 (1943); *Wilder* v. *Kneeland,* 94 N.H. 185, 49 A. 2d 506 (1946).

More important is this Court's recognition of the nature of a so-called "trial by jury" before a justice of the peace. In *Capitol Traction Co.* v. *Hof,* 174 U.S. 1 (1899), the seventh amendment's prohibition against the "re-examination" of any "fact tried by a jury" was considered. *Hof* commenced a negligence action

against the Traction Company seeking damages of $300;[8] in the justice of the peace courts a jury trial was demanded. *See id.* at 2-3. The question presented to the Court was whether, where trial by jury was initially had before the justice of the peace, a jury trial *de novo* on appeal in the District's Supreme Court was a reexamination of facts tried by a jury before the justice of the peace and hence prohibited by the seventh amendment. The Court, after extensive historical analysis, answered the question in the negative. *See id.* at 45. The basis of the Court's holding was its determination that the proceedings before the justice of the peace did not amount to a "trial by jury", as that term was used in the seventh amendment. *See id.* at 18. It was recognized that Congress could provide for trials before the justice of the peace, to be decided by any specified number of persons in his presence, "[b]ut such persons, even if required to be twelve in number, and called a jury, were rather in the nature of special commissioners or referees." *Id.* at 38. Accordingly, *Hof,* sustains the validity of the Court of Appeals view that the Maryland statute provided no right of trial by jury to be preserved by the seventh amendment. The origin of the right to jury trial in summary eviction proceedings was thus solely statutory; Congress, having given the right in the 1864 amendments, see p. —, *supra,* is free to take it away and has done so.

The determination that the claim asserted was not triable to a jury under the practice of 1790 does not, however, end the inquiry, for where a new cause of

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[8] The action was thus unquestionably one at common law where the amount in controversy exceeded $20.

action is created by Congress, the constitutional jury trial question is to be resolved by fitting the cause into its nearest historical analogy. *See Luria* v. *United States,* 231 U.S. 9, 27-28 (1913). As noted on p. — *supra,* the possible historical analogs are the action for ejectment, writ of assize of novel disseisin, and writ of entry.

The Court of Appeals rejected the action in ejectment as the appropriate historical analog on two grounds—the presence of the considerably more cumbersome and limited action for ejectment in another section of the code, D.C. Code § 16-1124 (1967), and the fact that the question of title was always present in actions for ejectment.[9] *See* 294 A.2d at 492-93. As Mr. Justice Story observed, the "professed object [of the action of ejectment] is to try the titles of the parties." *See McArthur* v. *Porter,* 31 U.S. (6 Pet.) 205, 211 (1832). Accordingly, although this court has stated that "the Seventh Amendment, for example, entitled the parties to a jury trial in actions . . . for recovery of land . . . ," *see Ross* v. *Bernhard,* 396 U.S. 531, 533 (1970), the cases to which the Court referred were actions in ejectment involving title. Actions for recovery of land are to be distinguished from actions for recovery of *possession* of land. This Court has consistently recognized this distinction, "one of the most universal and best known distinctions of the common law." *See Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133, 134 (1915). Claims of ultimate right are properly excluded from possessory actions. *See Bianchi* v. *Morales,* 262 U.S. 170, 171 (1932). *Accord,*

[9] The unavailability of the summary procedure where the tenant disputed title has been an integral part of the statute from 1793 to the present. *See* pp. —, —, *supra.*

Frazee v. *Beattie,* 26 S.C. 348, 351-52, 2 S.E. 125, 127 (1886).

The fact that the landlord in the District of Columbia can pursue the ejectment remedy of D.C. Code §16-1124 (1967) against a defaulting tenant does not convert the summary eviction statute to ejectment's equivalent for seventh amendment purposes. *In Cameron* v. *United States,* 148 U.S. 301 (1893), this Court considered a statutory summary proceeding for the removal of unlawful enclosures of public lands.[10] The government's contention that the proceeding was in the nature of a common law action was rejected. *See* 148 U. S. at 304. Noting that the common law remedies of ejectment or trespass were available to the government, the Court nonetheless held that the "proceeding contemplated by this Act is more nearly analogous to the summary remedies provided for the enforcement of mechanic's liens considered by this Court in *Idaho & O. Land Imp. Co.* v. *Bradbury,* 132 U.S. 509 [(1889)]." *See id.* at 305. *Bradbury* further recognized that an advisory jury employed by the judge in an equity proceeding does not transform the action to one at common law. *See* 132 U.S. at 514.

The Court of Appeals found the closest historical analog to be the writ of assize of novel disseisin. *See* 294 A.2d at 494. This view is supported by the decisions of this Court, *see Lindsey* v. *Normet,* 405 U.S. 56, 68 n. 14(1972), and is not seriously questioned by petitioner. However, petitioner mis-

[10] By the Act of February 25, 1885, ch. 149, § 1, 23 Stat. 321, Congress declared unlawful the enclosure of public lands by any person without good faith claim or color of title to the land. Section 2 of the Act authorized the proper territorial district court to order the summary destruction of the enclosure. *See* 23 Stat. 32.

apprehends the effect of that writ's provisions, asserting that "the use of the jury was obligatory." *See* Brief at 27 n.3, and accompanying text. While the writ unquestionably directs the sheriff to summon "twelve free and lawful men . . . to view th[e] tenament," *see id.*, as demonstrated in pp. 12-14, *supra*, the body thus summoned was in the nature of a special commission or panel of referees, rather than a "jury" as that term was known to the common law.

The tenant further asserts that apart from any right to trial by jury on the landlord's claim, he has a right to a jury trial on the issues raised in his setoff and counterclaim. Primary reliance is placed on this Court's decisions in *Dairy Queen Inc.* v. *Wood*, 369 U. S. 469 (1962), and *Beacon Theaters, Inc.* v. *Westover*, 359 U. S. 500 (1959). Resolution of the issue raised thus turns on analysis of petitioner's claim asserted in the trial court.

The issues litigable by a tenant in summary eviction proceedings vary widely in the jurisdictions across the nation. *See Lindsey* v. *Normet*, 405 U.S. 56, 60-61 (1972). While no denial of due process flows from the relegation of claims of ultimate right and defenses sought to be raised in possessory actions, *see id.* at 67-68, the procedures in the District of Columbia have evolved in modern times to considerably broaden the scope of litigable issues; this evolution has been judicial rather than legislative. A tenant can obtain equitable relief to avoid eviction by payment of rent found in arrears. *See Molyneaux* v. *Town House, Inc.*, 1195 A.2d 744, 746-47 (D. C. Ct. App. 1963). Moreover, the common law wall which had shielded the landlord from an obligation to maintain the leased premises was breached by the court in *Brown* v.

Southall Realty, 237 A.2d 834 (D. C. Ct. App. 1968), where the court held that the landlords knowing failure to maintain habitable premises in substantial compliance with the District's Housing Regulations at the time the lease was executed rendered the lease void and unenforceable.

The wall was virtually swept away by the subsequent decision in *Javins* v. *First National Realty Corp.,* 138 U. S. App. D. C. 369, 375, 428 F.2d 1071, 1077 *cert. denied,* 400 U. S. 925 (1970), which held that a warranty of habitability and substantial compliance with the regulations would be an implied covenant of every lease of real property located within the District of Columbia. As a consequence of warranty thus judicially implied, where the tenant proved that the landlord's total breach of the warranty extinguished the entire rental obligation, judgment would be for the tenant; on the other hand, if the tenant demonstrates that the rental obligation has been suspended merely in part or fails to show any breach, judgment for possession would issue subject to the equitable relief under *Molyneaux, supra,* upon payment of the rent in arrears diminished by the rent abated by partial breach. *See Javins* at 370-71, 428 F.2d at 1082-83. Thus, as the Court of Appeals noted, the setoff and counterclaim asserted were properly considered as equitable defenses of recoupment and setoff, respectively. *See* 294 A.2d at 496. Pernell correctly makes no claim that the seventh amendment secures a right to trial by jury for issues raised in equitable claims or defenses. Petitioner's principal attack on this branch of the Court of Appeals decision is by the assertion that the defense contem-

plated by *Javins, supra,* raises issues[11] which are manifestly legal. *See* Brief at pp. 44-46. However, the *Javins* court, in treating the question before it in the conventional terms of contract and warranty, did not speak in the seventh amendment context. The court clearly indicated that it was rejecting the rigid construction of leases which traditionally prevailed at common law, thereby establishing a common law, (as distinguished from statutory law) of the District of Columbia in 1970 radically different from "the common law" of England and the states in 1791. *See Javins* at 375, 428 F.2d at 1077.

> "The doctrine that when classification is necessary, a court should look to the historical basis of the plaintiff's right under the English law in the light of such modifications as have taken place in this country, is not always an accurate one. The equitable characteristics of the relief sought must be considered, for the courts of chancery have always claimed and exercised the right to provide a remedy for every wrong not cognizable by courts of law, and the *complexities of the present social order have brought about conditions which were unknown when the English courts of Equity were established." DeGarmo* v. *Goldman,* 19 Cal. 2d. 755, 759, 123 P.2d 1, 3 (1942) (emphasis supplied).

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[11] The characterization of the issues raised in the tenant's defenses and counterclaims is somewhat simplistic for "issues are not inherently legal or equitable. They are like chameleons which take their color from their surrounding circumstances." James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 692 (1963). For example, the conventional contact issues of consideration, agreement, breach, etc., are "legal" in the context of an action for damages yet "equitable" in the context of an action for specific performance.

It is precisely in this context that the *Javins* court provided the remedy for a wrong not cognizable at common law. *See Javins* at 375, 428 F.2d at 1077. Since the habitability defense was judicially created, it can be judicially limited in the manner of its exercise, as was done by the Court of Appeals here. *See* 294 A.2d at 498. It is clear that due process is not offended by limitation of the *Javins* defense to diminish rent in arrears and relegation of affirmative claims to separate actions. *See Lindsey* v. *Normet,* 405 U.S. 46, 68 (1972).

Petitioner's reliance on *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962), and *Beacon Theaters, Inc.* v. *Westover,* 359 U. S. 500 (1959), is misplaced as those cases concerned the protection of seventh amendment rights through the priority of issue determinations common to legal and equitable claims litigated in the *same* proceeding. These concerns come into play only if the court's finding as to the amount of rent in arrears is conclusive at the subsequent action brought by the tenant. The Court of Appeals expressly left that question open, 294 A.2d at 497 n. 22, and its resolution should appropriately await an actual controversy raising that issue.[12] *See* U. S. Const., Art. II, §2.

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[12] It is clear however, that if this Court rules in petitioner's favor, the question left open by the Court of Appeals would be answered in the affirmative since the finding could not be reexamined in any court. *See* U. S. Const., amend. VII; *Capitol Traction Co.* v. *Hof,* 174 U. S. 1 (1899).

CONCLUSION

It is accordingly urged that the decision of the District of Columbia Court of Appeals was correct and should be sustained.

Respectfully submitted,

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